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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No: 961

THE AMERICAN TOBACCO COMPANY,
Petitioner,

—v.—

MARY GREEN,
Respondent.

THE AMERICAN TOBACCO COMPANY,
Petitioner,

—v.—

EDWIN GREEN, JR., as Administrator of the Estate of Edwin Green, deceased,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above cases on December 11, 1963.

Citation to Opinions Below

The opinion of the Court of Appeals dated December 11, 1963, printed in Appendix A hereto, *infra*, p. 1a, is reported at 325 F. 2d 673. Other opinions involving the same cases are reported at 304 F. 2d 70 and 85 and 154 So. 2d 169, printed respectively in Appendices C, D and E hereto, *infra*, pp. 21a, 53a and 56a.

Jurisdiction

The judgment of the Court of Appeals was entered on December 11, 1963 and is printed in Appendix B hereto, *infra*, p. 19a. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Questions Presented

1. When a Court of Appeals vacates a jury's general verdict of no liability for error in the charge, are that jury's answers to interrogatories under Rule 49(b) of the Federal Rules of Civil Procedure accompanying that verdict binding on the parties on the new jury trial of the liability issue?

2. When a Court of Appeals vacates a jury's general verdict of no liability for error in the charge and remands for a new jury trial, does the Seventh Amendment permit it to divide between the two juries the determination of the issue of a defendant's liability, by holding the parties bound on the retrial by the first jury's answers to interrogatories on certain factual matters and limiting the second jury to a consideration of other related factual matters in re-deciding the liability issue?

Constitutional Provision Involved

The Seventh Amendment to the Constitution provides:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Federal Rule of Civil Procedure Involved

Rule 49(b) of the Federal Rules of Civil Procedure provides:

"(b) **General Verdict Accompanied by Answer to Interrogatories.** The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one

or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial."

Statement of the Case

Summary Statement

Edwin M. Green began this personal injury action against The American Tobacco Company in December, 1957, claiming he incurred lung cancer as a result of smoking defendant's[*] product, Lucky Strike cigarettes. Mr. Green died on February 25, 1958, whereupon his son and administrator, Edwin Green, Jr., was substituted as plaintiff under the Florida Survival Statute (§45.11, F. S. 1959) and his widow, Mary Green, filed suit under the Florida Wrongful Death Statute (§§768.01, 768.02, F. S. 1959). These actions, seeking damages of $1,750,000, were all originally filed by plaintiffs in the United States District Court for the Southern District of Florida, Miami Division, based upon diversity of citizenship jurisdiction.

The survival and wrongful death suits were consolidated and presented for trial in July 1960 upon the plaintiffs' combined "First Amended" complaint and the defendant's answer thereto as amended (R. I, 2-18, 18-24). Plaintiffs alleged six theories of liability common to both claims in separate counts: (1) breach of implied warranty; (2) breach of express warranty; (3) negligence; (4) fraudulent misrepresentation; (5) battery; and (6) violation of Florida and Federal Food, Drug and Cosmetic Acts and the Federal Trade Commission Act.

At the conclusion of plaintiffs' evidence, in a ruling never subsequently questioned, the court directed a verdict for

[*] Petitioner was defendant below and is sometimes hereinafter referred to as "defendant".

defendant on all counts except breach of implied warranty and negligence (R. 639-42), which were submitted to the jury (R. 1105-6, 1124). The jury returned general verdicts for the defendant in both cases and judgment was entered for defendant in each case on those verdicts (R. 1141-2).

After plaintiffs' post-trial motions were denied, they appealed to the United States Court of Appeals for the Fifth Circuit (R. 1157-60). Their appeals, when briefed and argued, were confined basically to contentions that the trial court had erred in instructing the jury regarding defendant's liability on implied warranty under Florida law and that judgments should be entered for plaintiffs on that issue on the basis of the jury's answers to written interrogatories (R. 1162-3)—despite the consistency of those answers with the general verdicts for defendant.

The Court of Appeals first affirmed the judgments for defendant (304 F. 2d 79 [1962]; App. C, *infra*, p. 21a), then reversed them and ordered a new trial (325 F. 2d 673 [1963]; App. A, *infra*, p. 4a; App. B, *infra*, p. 19a), each time by a divided court. The reversal followed an advisory opinion from the Supreme Court of Florida (154 So. 2d 169 [1963]; App. E, *infra*, p. 56a) on a question of Florida implied warranty law which the Court of Appeals had certified to that court although remaining "of the same views as expressed in their opinions on original hearing" (304 F. 2d at p. 86; App. D, *infra*, p. 55a).

The Ruling Sought to Be Reviewed

In reversing and remanding the case for a new trial, the Court of Appeals acknowledged that "[t]he only theory of liability remaining in the case is that of implied warranty" (App. A, *infra*, p. 4a). But in an unprecedented ruling it undertook to limit the new jury's consideration of that issue, as follows (App. A, *infra*, pp. 9a-10a):

"Further, while the general verdicts for the defendant are vacated, the parties are nonetheless bound by the jury's answers to the written interrogatories. The answer to (1), (2) and (3) (304 F. 2d 71, 72) will be directly pertinent upon another trial. The parties may not re-litigate the issues thus already decided under the guise of presenting evidence on the issue of reasonableness, that is, as to whether the cigarettes were *reasonably* fit and wholesome. The evidence to be adduced on that issue must assume as already conclusively established the issues decided by interrogatories (1), (2) and (3)." [Emphasis the court's.]*

In so ruling, we respectfully submit that the Court of Appeals not only gave a jury's answers to interrogatories under Rule 49(b) of the Federal Rules of Civil Procedure an adjudicative effect not intended by that Rule, but also denied petitioner its right to a fair new trial under the Seventh Amendment to the United States Constitution.

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* The court's reference is to four interrogatories which the trial judge formulated and submitted to the jury pursuant to Rule 49(b) of the Federal Rules of Civil Procedure, "seeking to find from you your opinion on certain factual matters that have occurred in this trial" (R. 1124). These interrogatories and the jury's answers were as follows (R. 1139-40):

1. Did the decedent Green have primary cancer in his left lung? Yes.
2. Was the cancer in his left lung the cause or one of the causes of his death? Yes.
3. Was the smoking of Lucky Strike cigarettes on the part of the decedent, Green, a proximate cause or one of the proximate causes of the development of cancer in his left lung? Yes.
4. Could the defendant on, or prior to, February 1, 1956, by the reasonable application of human skill and foresight have known that users of Lucky Strike cigarettes, such as the decedent Green, would be endangered by the inhalation of the main stream smoke from Lucky Strike cigarettes of contracting cancer of the lung? No.

contrary to this Court's decision in *Gasoline Products Co., Inc.* v. *Champlin Refining Co.*, 283 U. S. 494 (1931).

Since no new trial has as yet been had, and the ruling in question is clearly fundamental to the further conduct of this case, petitioner believes that special and important reasons exist which call for the exercise of this Court's discretion to review the judgment now. Certainly the ruling is one of potentially wide application in view of the increasing use of Rule 49(b) interrogatories and one which poses a serious problem if the constitutional right to a jury trial is not to be jeopardized by indiscriminate use of the Rule.*

To demonstrate how substantially the ruling below departs from the accepted and usual course of judicial proceedings in this Court and in other Courts of Appeal, a brief exposition is necessary concerning the implied warranty claim plaintiffs alleged and the factual matters inextricably involved in any jury determination of the merits of that claim, the context in which the Rule 49(b) interrogatories were submitted and answered by the former jury, and the injustice manifestly bound to result from dividing decision of the issue of defendant's liability between two juries.

The Indivisible Liability Issue to Be Retried

Plaintiffs' implied warranty claim, now ordered retried, alleged in substance that defendant, "possessed of superior

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* Two Associates Justices of this Court, in urging repeal of Rule 49, have observed:

"A scrutiny of the special verdict and written interrogatory cases in appellate courts will show the confusion that necessarily results from the employment of these devices and the ease with which judges can use them to take away the right to trial by jury." *Statement of Mr. Justice Black and Mr. Justice Douglas on the Rules of Civil Procedure and the Proposed Amendments*, 31 F. R. D. at pages 618-619 (1963).

knowledge concerning the nature and the manufacture of Lucky Strike cigarettes", thereby "impliedly warranted [they] were fit and safe for human consumption"; that Edwin Green "had no knowledge of or ordinary means to determine" their fitness and "relied" on the warranty in smoking them; that the cigarettes contained "numerous substances which were harmful to the human body" when "used for the purpose and in the manner intended"; that as a result of the foregoing, Green either contracted lung cancer or a pre-existing dormant cancer was activated, which caused his death (R. 4-5).

At the trial of this claim, in addition to requesting general verdicts from the jury, the trial court formulated and submitted four written interrogatories pursuant to Rule 49(b) of the Federal Rules of Civil Procedure, "seeking to find from you your opinion on certain factual matters that have occurred in this trial" (R. 1124).

But, as the court below emphasized (App. A, *infra*, p. 8a), the interrogatories submitted represented only some of the matters of fact the first jury—or any jury—had to pass upon to resolve the ultimate and indivisible issue of defendant's liability upon the theory of breach of implied warranty.* Other matters essential to its decision,

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* The trial court so instructed the jury at the outset of the charge (R. 1106):

> "Your function in this lawsuit is to try and determine the issues of fact. The issues of fact are those material allegations alleged on one side and denied on the other side.
>
> "If you will recall, it is alleged on the plaintiffs' side—No. 1, that Mr. Green died because of the alleged negligence of the defendant; and No. 2, and really in the alternative, although both could be true, that he died because the defendant breached implied warranty of fitness as respects to the cigarettes sold to the deceased."

were covered in the trial court's charge, *e.g.*, proximate cause, reasonable fitness (R. 1115, 1117).*

As part of that charge, the jury was instructed that "you must consider the instructions as a whole" and that "you are permitted to draw from the facts which you find to have been proved such reasonable inferences as seem justified in the light of your own experience" (R. 1107, 1108).

The net results of the jury's consideration of all the evidence in the light of the trial court's instructions, including the interrogatories submitted to it, were general verdicts for defendant of no liability.

Prejudicial Effect of the Error Below

The Court of Appeals having vacated the general verdicts for defendant because of error in the charge, the issue of defendant's liability for breach of implied warranty is

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* The question of reasonable fitness was put to the jury in these terms (R. 1117):

> "Now, the other theory in this case is the theory of implied warranty. The manufacturer of products which are offered for sale to the public in their original package for human consumption or use impliedly warrants that its products are reasonably wholesome or fit for the purpose for which they are sold, but such implied warranty does not cover substances in the manufactured product, the harmful effects of which no developed human skill or foresight can afford knowledge."

The error in the charge for which defendant's general verdicts have been reversed related to the knowledge element of this charge (App. A, *infra*, p. 7a). The knowledge element reflected not only a matter plaintiffs alleged as part of their warranty claim (R. 4) but one they told the jury it had to decide. In opening to the jury, plaintiffs' counsel told them (R. 35-6):

> "We have also separately charged that they have impliedly warranted that they are fit and safe for human consumption.
>
> "The issue is whether the manufacturer knew of these harmful substances in the product and either failed to remove it or failed to warn the public including Edwin Green, of these harmful substances."

still unresolved and a new jury must now re-decide it. In such a situation the accepted and usual course of judicial proceedings would have been to remand the case for a whole new trial. Instead, under the ruling below, the new jury is to be foreclosed from considering all the evidence bearing on liability and drawing its own inferences in the light of its own experience with respect to factual matters admittedly "directly pertinent upon another trial" (App. A, *infra*, p. 9a).

Unquestionably the new jury will be informed of the former jury's answers to the four interrogatories, either in instructions or in argument of counsel. Just as surely it will not be informed that those answers were reached in conjunction with a general finding of no liability on the part of defendant. To retrieve and preserve for a new trial selected facts—in this case favorable to the plaintiffs—while at the same time obliterating the jury's findings in defendant's favor embodied in the general verdicts now rejected, can only mislead the new jury as to the significance of those answers in re-deciding the issue of defendant's liability. Such a result, we submit, not only raises serious questions concerning the proper purpose and effect of Rule 49(b) interrogatories but also of the permissible extent of judicial re-examination of a jury's findings in light of the right to a jury trial under the Seventh Amendment.

Reasons for Granting the Writ

One important question which has not been, but should be, settled by this Court is whether a jury's answers to interrogatories submitted under Rule 49(b) may be retained to bind the parties on another trial after the jury's general verdict has been vacated and the case remanded to the Dis-

trict Court. Nothing in Rule 49(b) itself and no other authority that we have seen even suggests that such answers may ever be preserved for a new jury trial. We submit that the Court of Appeals' ruling proceeds from a misinterpretation of the proper purpose and application of the Rule.

The second and related question is whether such answers may be preserved if the necessary result will be to divide between two juries the determination of the issue of a defendant's liability to plaintiff. This was the result reached below, since the retained answers concern only some of the factual matters and legal elements of the ultimate issue of defendant's liability for breach of implied warranty—the issue to be retried (*supra*, pp. 5, 7-9). Petitioner believes that such a result has far-reaching implications respecting the right to jury trial as preserved by the Seventh Amendment and is in direct conflict with the principles governing partial new trials first established by this Court in *Gasoline Products Co., Inc.* v. *Champlin Refining Co.*, 283 U. S. 494 (1931). There this Court distinguished between the "substance" of the right to jury trial preserved by the Seventh Amendment and the "old forms of procedure" which it does not perpetuate (283 U. S. at 498). Here, we submit, where the factual matters barred from relitigation are admittedly "directly pertinent" to the issue to be retried (App. A, *infra*, p. 9a), the division of the liability issue between two juries invades the substance of that right and is no mere change in procedure.

I.

The decision below raises novel and important questions of federal procedure involving the proper interpretation and application of Rule 49(b) of the Federal Rules of Civil Procedure.

The ruling below would appear to be based on an erroneous confusion of the purpose and effect of a jury's "written answers" to interrogatories with the quite different use of "special verdicts" under subsection (a) of Rule 49. As one commentator has stated (Barron and Holtzoff, *Federal Practice and Procedure*, Vol. 2B, §1051 (1961 ed.), p. 327):

> "Rule 49 authorizes two very different procedures as discretionary alternatives to the general verdict common in jury cases. Under subdivision (b) the judge may, if he sees fit, ask the jury to return a general verdict, but to accompany it with answers to certain interrogatories as to particular features of the case. Under subdivision (a) the court is given authority to dispense with the general verdict altogether, and to submit the various fact issues in the case to the jury in the form of individual fact questions, as to each of which the jury is to return a special verdict."

Rule 49(b) interrogatories are thus submitted not as a substitute for the general verdict as in Rule 49(a) but "to assist the jury in arriving at a verdict." *Dinicro* v. *United States Lines*, 288 F. 2d 595, 598 (2 Cir. 1961), cert. denied 368 U. S. 831 (1961). They served the same auxiliary function in many states prior to the adoption of the Fed-

eral Rules, as "A New Development in Jury Trial", 13 A. B. A. J. 715, 716 (1927),* points out:

> "The practice of submitting special interrogatories to a jury grew out of an early New England practice of questioning the jury as to the ground of their verdict. There is a clear distinction between this practice and a special verdict: A special verdict is in lieu of a general verdict and the sole basis of judgments; *special interrogatories are merely in aid of a general verdict.* They are never permitted except when a general verdict is returned and are designed to explain and test it.
>
> . . . . . .
>
> "*Special interrogatories are thus given an important but an auxiliary part to play.*" **

Rule 49(b) answers are intended to act merely as a "check" on the general verdict to "explain" or "test" the jury's consistency,*** but the Court of Appeals has treated them here not only as special verdicts but, in effect, as conclusive judgments separate and distinct from the now reversed judgments entered by the trial court. This is evident from its conclusions that the jury's answers to these interrogatories "conclusively established" and "decided" certain "issues" which "[t]he parties may not relitigate" (App. A, *infra*, pp. 9a-10a).

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* This article is referred to by The Advisory Committee on Rules for Civil Procedure in its Note to Rule 49, House Doc. No. 588, 75th Cong., 3d Sess. (1938) at page 45.

** Italics are ours throughout unless otherwise indicated.

*** *E.g.*, Moore, *Federal Practice*, Vol. 5, §49.04 (2d ed. 1951), p. 2209; Barron & Holtzoff, *Federal Practice and Procedure*, Vol. 2B, §1058 (1961 ed.), p. 353; Driver, "A Consideration of the More Extended Use of the Special Verdict," 25 Wash. L. Rev. 43, 44 (1950).

Moreover, the Court of Appeals has manifestly assumed, as a matter of law, that Rule 49(b) answers may properly survive the reversal of general verdicts even when they were entirely consistent with those verdicts. Nothing in the Rule supports this conclusion and no case we have seen reaches a similar result.* Indeed, the application of Rule 49(b) answers contained in the ruling below is contrary to the procedure followed by this Court and the Court of Appeals for the Third Circuit.

In *Magenau v. Aetna Freight Lines, Inc.*, 360 U. S. 273 (1959), an action for wrongful death was submitted to the jury "on special interrogatories covering the issues as to liability and a general charge as to the damages" (360 U. S. at 276). The jury had found, in answer to these interrogatories, that defendant was "negligent", that such negligence "was the proximate cause of the death" of plaintiff's decedent,** and that defendant was guilty of "wanton conduct" which was also a "proximate cause" of the death.*** It had also returned a verdict of substantial damages for plaintiff.

On review in this Court, following reversal in the Court of Appeals, this Court determined that a new trial was necessary because a disputed issue concerning the dece-

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*49(b) does provide that where the answers are consistent with each other but one or more is inconsistent with the general verdict the court *may*, but need not, enter judgment in accordance with the answers. In such circumstances it is presumed that the specific answers are a more accurate determination of the facts than the general conclusion. But in that situation, unlike the case at bar, there is still only one finder of all the facts.

**, *Magenau v. Aetna Freight Lines, Inc.*, 257 F. 2d 445, 447 (3 Cir. 1958).

***, *Magenau v. Aetna Freight Lines, Inc.*, 161 F. Supp. 875, 879 (W. D. Pa. 1957).

dent's employment status had been improperly submitted at the first trial. But this Court refused to limit a retrial to this question and required a full new trial despite the specific jury findings on the issues of the defendant's negligent and wanton conduct. This Court recognized the interrelation of the specific and general issues, saying (360 U. S. at 279):

> "We are therefore of the opinion that a new trial on the whole case is necessary, since these disputed issues are so interrelated with the ultimate issues of liability and damages that a limited hearing would not be in the interest of fairness and efficiency in judicial administration."

In *Hiltz* v. *Atlantic Refining Co.*, 151 F. 2d 159 (3 Cir. 1945), a seaman sought to recover for tuberculosis he claimed was either contracted or aggravated due to defendant's negligence in the course of his employment on defendant's ship. At trial the jury returned a general verdict for defendant, but, in answer to accompanying interrogatories, it found that defendant had been negligent in heating plaintiff's sleeping quarters, and that plaintiff had been infected with active tuberculosis when he joined the ship so that the defendant's negligence was not the proximate cause of plaintiff's illness.

On appeal, the judgment for defendant was reversed, the court ruling that plaintiff would be entitled to recover if defendant's negligence aggravated an active tuberculosis. In remanding for a full new trial, the Court of Appeals rejected the same contention as plaintiffs here argued in the court below (App. A, *infra*, p. 2a), *i.e.*, that a new trial should be restricted solely to the question of damages, in view of the former jury answers to the other interrogatories. In so doing, the court stated (151 F. 2d at 162):

> "In view of the fact that there is no finding by the jury that the defendant's negligence was the cause of any aggravation of the plaintiff's diseased condition, the futility of the suggestion is apparent. Moreover, the ends of justice require both the plaintiff and the defendant to have their respective days in court at a new trial."

No case has been found reaching a result different from the *Magenau* and *Hiltz* cases and similar to that reached below.

In short, the ruling below now gives Rule 49(b) answers even greater effect than "special verdicts" under Rule 49(a). It is not too much to say that it endows them with the quality of *res judicata* or "law of the case", though it is well established that "it requires a final judgment"—which no longer exists here—to "sustain the application" of those doctrines. *United States* v. *United States Smelting, Refining & Mining Co.*, 339 U. S. 186, 199 (1950).* Indeed, this Court long ago refused to give effect to a jury's special verdict on one question, so as to bind the parties at a subsequent trial, after the judgment entered on the first trial had been reversed. *Smith* v. *McCool*, 83 U. S. 560 (1872). As the Court there stated (at p. 562):

> "If the judgment originally rendered upon the special verdict here in question had still subsisted, the case would be a different one. But that judgment was reversed. *The reversal took away all efficacy from the verdict.*"

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* Similarly, the doctrine of collateral estoppel is "inoperative" where there has not been a "prior judgment". *Yates* v. *United States*, 354 U. S. 298, 338 (1957). And it may not even then be invoked, "[s]o far as merely evidentiary or 'mediate' facts are concerned" (*Ibid.*); see also *Tidewater Oil Company* v. *Jackson*, 320 F. 2d 157, 161 (10 Cir. 1963).

As already noted, two of the Justices of this Court are of the view that the employment of Rule 49 has been attended with much confusion and may easily be used to take away the right of trial by jury (*supra*, p. 7, fn.). The confusion and the need for clarification concerning the purpose, application and effect of the Rule is, we submit, quite evident in this case. The need for review would appear all the more urgent when the ruling below has the effect of dividing between two juries the determination of such an indivisible issue as that of defendant's liability for alleged personal injuries and wrongful death on the theory of breach of implied warranty.

II.

The decision below conflicts with prior decisions of this Court and contravenes petitioner's right to trial by jury as preserved by the Seventh Amendment.

In *Gasoline Products Co., Inc.* v. *Champlin Refining Co.*, 283 U. S. 494 (1931), this Court considered the effect of the Seventh Amendment upon an interlocutory judgment of a Court of Appeals which had reversed a trial court's judgment entered on jury verdicts and remanded the case for a partial new trial restricted to the determination of damages only. The Court of Appeals had reversed because of errors in the charge with respect to the measure of damages on respondent's counterclaim. The petitioner there contended that "the withdrawal from consideration of the jury, upon the new trial, of the issue of liability on the contract set up in the counterclaim, is a denial of its constitutional right to a trial by jury" (283 U. S. at 497).

This Court, in reversing and ordering a full new trial on the counterclaim, enunciated the constitutional requirements for partial new trials in these terms:

(1) There must be a "verdict according to law" (*id.* at 499):

> "Here we hold that where the requirement of a jury trial has been satisfied by a verdict according to law upon one issue of fact, that requirement does not compel a new trial of that issue even though another and separable issue must be tried again."

(2) The issue to be retried must be "distinct and separable" (*id.* at 500):

> "Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice."

In *Gasoline Products* this Court found the first requirement satisfied but not the second. The partial new trial ordered by the court below satisfies neither of these requirements.

First, the former jury's answers to interrogatories under Rule 49(b) are not "verdicts" (*supra*, pp. 12-13). Here, the only verdicts were the general verdicts for defendant. Those verdicts no longer stand as a "verdict according to law" because they have been vacated for error of law.

Since nothing was "correctly determined in accordance with the constitutional command" at the first trial (283 U. S. at 498), the substance of trial by jury has not yet been satisfied here. Nor will it be satisfied unless the issue to be redetermined—that of defendant's liability—is retried in full.

Second, the ruling below disregards the constitutional requirement of separability. Here what must be retried is

the issue of defendant's liability. But what is ordered to be retried are not some factual elements of that single issue. And what may not be relitigated are other interrelated factual elements of that issue—though admittedly these are "directly pertinent upon another trial" (App. A, *infra*, p. 9a). For example, one factual element to be retried—whether an article is "*reasonably* fit and wholesome" (App. A, *infra*, p. 7a)—is a matter of degree (see, *e.g.*, 1 Williston on Sales §243 [1948 ed.]), requiring consideration of all the facts and circumstances.

The sharp disagreement in the testimony on all the factual elements placed before the first jury could only have given rise under all the circumstances to conflicting inferences. These the first jury was instructed to resolve (R. 1108) and had to resolve in arriving at its general verdicts for defendant. And as this Court has said, "[t]he very essence" of the jury's function "is to select from among conflicting inferences and conclusions that which it considers most reasonable". *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U. S. 29, 35 (1944).

But that is precisely what the new jury cannot do under the ruling below. Instead of being permitted to consider all the evidence bearing upon reasonable fitness or any other element entering into the issue of liability, and to draw "such reasonable inferences as seem justified in the light of [its] own experience" (R. 1098), the new jury must now decide that unresolved issue partly on the basis of another jury's inferences and conclusions. The effect of the ruling below is thus to divide between two juries the determination of factual matters related to each other and to the issue of liability to be decided.

Only confusion and uncertainty can result from such a procedure—particularly where the predigested conclusions to be imposed are detached from the context of the "no

liability" verdict. Such "confusion and uncertainty * * * would amount to a denial of a fair trial." *Gasoline Products Co., Inc.* v. *Champlin Refining Co.*, *supra*, 283 U. S. 494, 500.

Neither this Court nor any other court has sanctioned the departure from the accepted and usual course of judicial proceedings attempted in the ruling below. Indeed, that ruling, we submit, conflicts with this Court's decisions in *Gasoline Products*, *supra*, and in *Magnum* v. *Aetna Freight Lines, Inc.*, 360 U. S. 273 (1959). Unless now corrected it will deny petitioner its right to a jury trial as preserved by the Seventh Amendment.

Preservation of the right to a jury trial has always concerned this Court. And this Court has found it "particularly undesirable to have some of the relevant considerations tried by one fact finder and some by another" where the ultimate issue can be decided only "in light of all the facts." *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500, 508 (1959). There this Court said (*id.* at 501):

> "We granted certiorari, 356 U. S. 956, because 'Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.' *Dimick* v. *Schiedt*, 293 U. S. 474, 486."

Petitioner submits that the curtailment evident here should be scrutinized for the same reason.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

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Dated: March 31, 1964

Certificate of Service

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari was served by mail this 31st day of March, 1964 upon Neal P. Rutledge, 111 N. E. 1st Street, Miami, Florida, and upon Lawrence V. Hastings, 312 Biscayne Building, Miami, Florida, counsel of record for respondents herein, by depositing the same in a United States mail box at 25 Broadway, New York, N. Y. 10004, in a wrapper addressed to each of said counsel as aforesaid with sufficient airmail postage prepaid.

EDWARD R. NEAHER
Counsel for Petitioner

Dated: March 31, 1964.